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Current Topics.

Reprisals.

THE facts concerning the latest Nazi barbarity in chaining prisoners of war far away from the actual battle front are too well known to receive further repetition in these columns, but the legal issues are of vital interest not merely to lawyers but to all those who desire to see our liberties and way of life preserved and protected. The importance of the place of international law in the present struggle was recognised by the LORD CHANCELLOR in his recent statement in the debate on the punishment of war criminals, when he said, with reference to a particular aspect of international law: "Since the time of Hugo Grotius, by the effort of men of many nations, including in the past some distinguished Germans, a code of conduct has gradually been evolved, which has been treated, not as the vain imaginings of a few pedants, but as a practical guide." Whatever the motives of the Germans were in ordering the shackling of prisoners of war, one can be quite certain that they were not those of legitimate reprisals. Reprisals are without doubt admissible for all cases of international delinquency, but no one will believe that tying prisoners' hands on the actual field of battle, even if it did occur, is delinquency for which reprisals are called. In any event, the Germans completely destroyed their case by ordering reprisals which were fantastically out of proportion to anything which even they alleged against our forces. It is of the very essence of reprisals that they should be proportionate ("Oppenheim on International Law," 1940, vol. II, p. 115). Judged by this standard, the action of the British and Canadian Governments has been strictly within the law. As recently as 1929 the representatives of forty-seven States signed two conventions at the Hague containing, among other matters, provisions for the humane treatment and protection of prisoners of war, particularly against acts of violence, insults and public curiosity. Article 46 prohibits all forms of corporal punishment, confinement in premises not lighted by daylight, and all forms of cruelty whatsoever. Reprisals against prisoners of war are also forbidden. No criminal, however, is ever so stupid as to imagine that the police will not resort to any violence which may be necessary to secure an arrest for a crime of violence. It is strange, though true, that in this respect at least, Nazi psychology is lower than that of the average criminal.

Punishment of War Criminals.

A DEBATE of vital importance on the punishment of war criminals took place in the House of Lords on 7th October, when LORD MAUGHAM opened with a masterly analysis of the juridical position and an account of the failure at the end of the last war to bring to justice the majority of those named in the list of 896 war criminals handed to the German Ambassador. The trial of Germans in Germany by Germans, according to German law (said his lordship), broke down, to the surprise of very few people who understood the German mentality. LORD MAUGHAM examined the different advantages and defects of national courts, military courts and international courts, respectively, and expressed a preference for national courts for the trial of offences against the subjects of the nation trying the cases. It would be necessary to extend the jurisdiction of British courts, and this would not be contrary to International Law. There were (his lordship said) a number of types of case which could only be tried by an international court, such as offences against persons deprived of their nationality, particularly against Jews, cases of mass murder as a result of drastic removal of foodstuffs and similar cruelties, and the removal of young women to unknown destinations obviously for the purposes of prostitution. There was finally the question of the restitution of property stolen by the Germans, which must be left to a Restitution Commission which should have military assistance. The MARQUIS OF CREWE expressed a preference for military tribunals as against "the dignified apparatus of our High Court with possible recourse to appeals." VISCOUNT CECIL emphasised the paramount necessity of having the apparatus of justice ready for the end of the war, to prevent the wholesale massacre of anybody who might be thought to be Germans or sympathisers with the Germans. The Nazi attempt to destroy the universal respect for law and justice was a terrible evil, "because on the supremacy of the law depends all the great structure of liberty and political freedom which we have erected in this country and which has been followed in so many other countries of the world." The LORD CHANCELLOR expressed the view that the victorious armies in the field might well turn out to be the bodies which would provide very effective and prompt working tribunals for dealing with many of these horrible cases. His lordship indicated his views as to the place of national and international courts, but stated that all courts were powerless unless the evidence was recorded and the presence of the accused could be secured at his trial. It was proposed (his lordship said) to set up at once a United Nations Commission for the Investigation of War Crimes, to collect material, supported wherever possible by depositions and documents. A corresponding statement as to the establishment of the commission was being issued in Washington by the President of the United States that afternoon. At the same time it had been agreed that named criminals wanted for war crimes would be caught and handed over at the time of and as a condition of the armistice. The proposals had been communicated to the other United Nations, the Dominions and India, and already the Allied Governments in London and the French National Committee had replied warmly approving and adopting them. VISCOUNT MAUGHAM, in his reply, also stated that according to a lawyer's idea, martial law was not law at all, so that military courts would be unsuitable for the trial of war criminals. The joint statement of war aims for the punishment of criminals and of plans for their achievement has not come a moment too soon, and it may well prove in the end to have been one of the most potent weapons of victory.

The Right of Search.

THE oft-repeated assertion that an Englishman's home is his castle, as well as the desirability of maintaining some traditional liberties even in war-time, lend no little interest to the short debate in the House of Lords on 6th October on an abortive search by Ministry of Food officials. The fact that the object of the search was the home of a deputy-lieutenant for the county, a county alderman and a chairman of the bench of forty-five years' standing was, as LORD MAUGHAM pointed out, relevant only to the question whether communications to his discredit should be believed. The issues were put by LORD BLEDISLOE, firstly in stigmatising the delators and secret informers on whose information the Ministry of Food acted, and in comparing them to the type of person who flourished in Rome at the time of Tiberius or Nero. The second issue raised by LORD BLEDISLOE was under the Acquisition of Food (Excessive Quantities) Order of 19th March of this year, under which "any person authorised in writing by or on behalf of the Minister of Food may enter on any premises on which he has reason to believe that food of any description is being kept which has been acquired in contravention of the order, and may carry out such inspection of the premises as he may consider necessary, and may require the occupier of the premises to furnish him with such information in connection with any such food as he may consider necessary." His lordship then referred to the general right of search given to police constables and members of His Majesty's Forces under reg. 88A of the Defence (General Regulations) and to police superintendents and persons authorised by the Secretary of State to act in certain cases without a warrant, and suggested that the right of search given by the Acquisition of Food (Excessive Quantities) Order might well be *ultra vires* the Defence Regulations. In his reply, LORD WOOLTON stated that it was the Minister's duty to

act on information which established a *prima facie* case of suspicion, even where that suspicion turns out later to be unfounded. No one is likely to quarrel with this statement, assuming that the Minister's powers under the order are not *ultra vires* reg. 55. Having regard to reg. 55 (1) (*e*), it is difficult to understand the contention that the order is *ultra vires*, except on the basis that all necessary powers of search are already given by reg. 88A and *expressio unius est exclusio alterius*. Whatever may be the truth of the matter, one satisfactory result of the debate is that the Minister has given his assurance that his officers most certainly would not have searched but for the invitation extended to them to do so by the wife of the owner of the house. Whether an invitation to search addressed to a person who has already shown the invitor his official card can in every case be described as entirely voluntary is another question, into which it may be relevant to inquire on some future occasion.

The Magistrates' Association.

THE magistrates' point of view on a large variety of topics was put before the nineteenth annual meeting of the Magistrates' Association, held at the Mansion House on 9th October. Both the LORD MAYOR, who opened the proceedings, and Mr. G. W. YANDELL, Chief Enforcement Officer of the Board of Trade, had observations to make on the "black market." The LORD MAYOR stated that the power to inflict imprisonment had proved most effective in dealing with the reluctant payer of fines, and there had been no question of offenders taking refuge in bankruptcy. Mr. YANDELL had interesting information to supply about the extent of the black market in silk stockings and cosmetics, and added that his experience showed that when a particular form of crime was prevalent exemplary sentences were the best antidote. Mr. CLAUDE MULLINS, a Metropolitan magistrate, referred to another black market, that in marriages, and told how a woman had admitted to him in cross-examination that she married in order to evade conscription. Mr. F. J. O. CODDINGTON, stipendiary magistrate for Bradford, speaking of matrimonial courts, said that in his court he did not attempt to hold the parties to strict procedure, but allowed the husband and the wife to give their version of the trouble, and often in the bickering which followed he was able to discover facts that were of material help to him. The LORD CHANCELLOR welcomed the fact that more women were now sitting as magistrates than formerly was the case, but said that it was not right for too many magistrates to be sitting on the bench nowadays when the demands on petrol and other things were so serious. LORD CALDECOTE said that juvenile crime had increased since the war, but offenders were not to be treated as outcasts against whom society must be protected, but as victims of what society had done, or failed to do. In 1941, as compared with the twelve months preceding the war, indictable offences proved in courts of summary jurisdiction to have been committed by children up to fourteen had increased by 52 per cent., and in the case of young persons up to 16 by 44 per cent. The number of offences committed by girls had doubled, but it was still one-tenth of that committed by boys. In the twelve months before the war indictable offences proved against young persons numbered 29,100, a figure which rose to 43,200 in 1941. Punishment had its place, but reform had plain advantages. His lordship hoped that binding over without supervision had taken second place as a method of reform or correction. A report of the meeting will appear in our next issue.

Electric Tests in Murder Cases.

AFTER nearly a hundred years the rule in *Macnaughton's* case (1843), 8 E.R. 718, as to the questions to be put to the jury in asking them to consider whether a verdict of "Guilty, but insane" should be returned, has not been shaken. Science, however, has in the meantime made enormous progress, and the medical evidence which may be available for a jury to-day is very different in quality from that which used to be put forward a century ago. One of the most remarkable examples of this is provided by the electro-encephalograph which was recently used (according to Mr. K. B. DRENNAN, writing in *The Times* of 16th September) in a murder trial at Winchester Assizes. The defence raised was insanity due to an epileptic attack of the *petit mal* type. Apart from the record of the electro-encephalogram, there was no medical corroboration of the observations of non-medical witnesses, in spite of prolonged clinical observation in the prison infirmary. This is apparently the second time that the device has been used in a murder case. The electro-encephalograph amplifies and graphically records the minute electrical currents that occur in the brain. The writer stated that it is unanimously agreed by neuro-psychiatrists that a particular wave form, capable of being so recorded, is positive proof of epilepsy, although there may be cases of epilepsy which do not show this particular wave form. The writer points out that the verdict of the jury in the case at Winchester might well have been different if the electro-encephalogram had not been before the court. The onus is on the defence, and not on the prosecution to establish insanity, and under the legal aid certificates the maximum fee payable to a medical witness is three guineas a day. The instrument has only been in use in Great Britain since 1934, and there are only three or four in the country. Mr. DRENNAN therefore suggests (*a*) that the scale of fees to medical witnesses under the legal aid rules should be substantially increased, or at least that discretionary increases should be allowed from public funds in proper cases; (*b*) that, in particular, the use of an electro-encephalograph should be allowed at the public expense in serious cases if the doctor certifies that there is a *prima facie* case for suspecting epilepsy. While it is true that medical evidence is not absolutely essential in order to prove insanity (*R.* v. *Dart*, 14 Cox 103), absence of such evidence is in practice a serious obstacle in the way of establishing insanity. The use of the electro-encephalograph has been justified, as there was obviously a danger of a verdict of guilty at the Winchester trial. If, as seems probable, the use of this device is to be continued and extended, it will be necessary for juries to be warned that a negative result is by no means proof of absence of epilepsy, but that a positive result is absolute proof of its presence.

Patent Law Reform.

"IN a sense the whole case for and against monopoly is brought to focus in the patent law." This is the burden of a long and careful analysis of the present legal position as regards patents and monopolies, in the "City Notes" of *The Times* of 7th September. The writer refers to criticisms of the practice of taking out "blocking patents" to prevent old methods from being rendered obsolete and capital already invested from being endangered, the disadvantages of the small man as compared with the large organisation in exploiting patents, and the use of the protection of the patent laws by the international cartel. The question put by the writer is whether the present safeguards against the abuse of monopoly rights are adequate. Section 27 of the 1907 Act, as amended in 1938, contains the safeguards against the abuse by the patentee of his monopoly rights, and under it any person can apply to the Comptroller-General of Patents three years after the grant of a patent alleging abuse of monopoly rights on any of the grounds there set out. The Comptroller is empowered by the same section to give relief by the issue of a compulsory licence. The deterrent effect of the section has been strong, and not many cases have been brought under it; none have been brought in 1939. There was, however, the writer stated, room for a strengthening of the Comptroller's powers, but that must not be at the expense of "the encouragement within the realm of any manner of new manufacture." The objection to a wide extension of the present "licences of right" system was that it put the meritorious invention on the same plane as the mediocre invention, so that the owner of the former might decide not to patent it, but to keep it secret. The best approach for strengthening the hands of the Comptroller was, in the writer's opinion, on the lines of the procedure already set out in s. 38 (*a*) of the 1907 Act, which provides that in the case of any patent for an invention capable of being used in the production of food or medicine, the Comptroller shall, unless he sees good reason to the contrary, grant to any person applying for the same a licence limited to the use of the preparation or production of food or medicine, but not otherwise. In settling the terms of such a licence and fixing the amount of royalty or other consideration payable, the Comptroller must have regard to the desirability of making the food or medicine available to the public at the lowest possible price consistent with giving to the inventor due reward for the research leading to the invention. The writer of the article suggests that if a suitable authority could be set up, licences could be granted along these lines in respect of any particular product where it is shown that the patentee has abused his monopoly rights. At present the patentee, if he chose, could make it rather costly for the applicant for a compulsory licence. The writer is to be congratulated on having formulated a highly constructive suggestion as to the solution of a legal problem on which much human happiness depends. It is to be hoped that Government investigation into post-war planning questions take such matters as these within its scope.

Recent Decisions.

In *Proctor* v. *Johnson and Phillips*, on 7th October, HILBERY, J., held that the proviso to No. 4 of the exemptions in the Generation, Transformation, Distribution and Use of Electrical Energy on Premises Order, 1908 (S.R. & O., No. 1312), providing that general precautions must be taken where a process or apparatus is used exclusively for testing or research purposes was of substantive force, and that non-compliance with the proviso to the exemption did not throw a defendant back on the regulations.

In *Fagot* v. *Gaches*, on 9th October, the Court of Appeal (MACKINNON, GODDARD and DU PARCQ, L.JJ.) held that, where an intending purchaser of premises is let into possession of the premises pending purchase, there was a strong inference in the absence of evidence to the contrary that the intending purchaser was a tenant at will. He was entitled to reasonable time to remove any property which he had brought upon the premises, but if he did not ask for time, but refused to quit and asserted an adverse title, he became liable to be summarily ejected.

Procedure in 1942.

(*Continued from p.* 291.)

Service out of the Jurisdiction.

Where a contract provides that it should be construed according to English law, and that the place of performance should be deemed to be England, and where the defendants are a company incorporated and trading in Eire, the writ itself must be served on them ; they are a British company resident in a British dominion, and are not entitled to the benefit of Ord. XI, r. 2 ; " Ireland " in the rules means Northern Ireland only (*Hume Pipe Co., Ltd.* v. *Moracrete, Ltd.* (1942), 1 All E.R. 74 (C.A.) ; MacKinnon, L.J., at p. 75, Goddard, L.J., at p. 76).

The master had given leave for service out of the jurisdiction, but the defendants applied to another master to set aside the order on the ground of irregularity. By r. 6, where the defendant is neither a British subject nor in British dominions, notice of the writ, not the writ, is to be served upon him. It was said that notice of the writ, only, should have been served. But the company was British, and Eire is a British dominion. By r. 2, where leave is asked to serve a writ in Scotland and in Ireland, if the judge thinks that there may be a concurrent remedy, the judge should consider the comparative cost and convenience of proceedings in England or in the place of the defendant's residence. But Dublin is not in " Ireland " within the meaning of the rule, for by Order in Council made under the Irish Free State (Consequential Provisions) Act, 1922, s. 6, any reference to Ireland in an enactment excludes the Irish Free State. Nor was this case an abuse of the process of the court within *Logan* v. *Bank of Scotland* [1904] 2 K.B. 495.

Goddard, L.J., points out that under Ord. XI, r. 1 (*e*), leave cannot be given to serve out of the jurisdiction a defendant *domiciled or ordinarily resident in Scotland.* The sub-rule applied to a defendant living in *Ireland* until the Irish Free State was established ; since then, it applies to a defendant living in Northern Ireland, only. The sub-rule also provides that leave cannot be given to serve out of the jurisdiction a defendant domiciled or ordinarily resident in Scotland or Ireland for a breach of contract committed within the jurisdiction, even though the contract may not have been made within the jurisdiction, or is not to be governed by English law.

Rule 2 deals with service of writs in Scotland or Ireland, whether the defendant is, or is not, domiciled or ordinarily resident there ; whether he is sued here depends on the balance of convenience. The same considerations should apply to British subjects in Eire as apply to Canada, Australia or South Africa. Finally, upon the question of discretion, the parties had, in effect, provided by their contract for a *forum* in the event of litigation, by saying that English law should apply, and that performance should be regarded as taking place in England.

Striking out Statement of Claim.

Where a detainee under reg. 18B of the Defence (General) Regulations, 1939, claimed damages for ill-treatment in breach of the Prison Rules, 1933, against the Home Secretaries in office during his detention, and against the governors of the prisons where he was detained, but did not allege that the Home Secretaries authorised the alleged ill-treatment, the statement of claim was struck out against the Home Secretaries with liberty to put in an amended claim, and was also struck out as embarrassing (some of the breaches not being actionable) with liberty to put in an amended claim. The action was not, at the present stage, dismissed (*Arbon* v. *Anderson and Others* (1942), 1 All E.R. 264 (C.A.)).

It was alleged that by (1940), Cmd. Paper, 6162, para. 12, the Prison Rules, 1933, apply to detainees ; that it was the legal duty of the Home Secretaries and of the prison governors to observe and to secure the observance of those rules. Lengthy particulars were given of the ill-treatment alleged. The defendants asked for the statement of claim to be struck out under Ord. XIX, r. 27, and Ord. XXV, r. 4, as disclosing no reasonable cause of action, as frivolous and vexatious, and as tending to embarrass the fair trial of the action, and they asked for the action to be dismissed under Ord. XXV, r. 4. The master ordered the statement of claim to be struck out and the action to be dismissed. The judge in chambers varied the order and allowed an appeal against the prison governors.

An action will not be dismissed under the rule just because the case is weak, said Luxmoore, L.J. (at p. 266).

> " A pleading will not be struck out under either order unless it is not only demurrable but something worse than demurrable, i.e., such that no legitimate amendment can save it from being demurrable, or it is embarrassing " (*ibid.*).

A plaintiff cannot sue the head of a government department for wrongs committed by a person in his employment. He can sue the person who commits the wrong and he can sue the higher official who expressly authorises a particular act—" not because he occupies an official position, but in spite of that fact " (*ibid.*). It was not alleged against the Home Secretaries that the acts complained of were done by their direction. The plaintiff should be at liberty to deliver an amended statement of claim against them. Against the prison governors there was an arguable case, but since the statement of claim in its present form was embarrassing, it was struck out with liberty to put an amended statement of claim in its place.

No distinction had been made between breaches for which the governors were said to be personally responsible and those for which they were said to be vicariously responsible. Nor had it been alleged that the Home Secretaries were under a legal duty (if there were such a duty) to ensure that rules and instructions were observed, and that they failed to fulfil such duty (*per* du Parcq, L.J., at pp. 267, 268).

See also Odgers, " Pleading and Practice," (1939), 12th ed., pp. 153–157.

(*To be continued.*)

A Conveyancer's Diary.

Re Lindop. II.

It may be remembered that in the " Diary " of 12th September I indicated that I proposed on a future occasion to discuss the drafting of wills designed to prevent the anomalies which may arise under s. 184 of the Law of Property Act where two or more persons perish in circumstances which make it uncertain which of them outlived the other. I added that I should welcome any ideas which subscribers might feel able to advance.

Further reflection has convinced me that the problem thus set is even more difficult than I had supposed. One correspondent writes to say that he recently drew a will containing the following principal clause : " If my husband . . . shall survive me for the period of seven days from the date of my decease I give devise and bequeath to him all my property of whatsoever kind nature or description and wheresoever situated but if my said husband shall not survive me for the said period of seven days then I give devise and bequeath the said property to any child or children of mine who shall survive me for the said period (and if more than one equally between them) or if neither my said husband nor any child of mine shall survive me for the said period of seven days then I give devise and bequeath such property to, etc."

This clause is perfectly satisfactory so far as it goes, but it does not cover anything except the very simplest case of a universal gift to the surviving spouse with a substitutionary absolute gift to children equally. It is, perhaps, fortunate for the inhabitants of Lincoln's Inn that a reasonable number of testators have more complicated ideas. Of course, if the testator has a really elaborate conception of his duty he can be provided with a really expensive will which could, at considerable length, cover every possible (or impossible) contingency. But the class which really troubles me is the intermediate one where there is a relatively small family and the testator has a relatively simple programme, but one which goes rather beyond absolute universal gifts. In such a case the testator will not want a document that is enormously long and which he finds difficult to understand, not to mention its costliness. The sort of case which I have in mind is one where the testator is the senior spouse, and has a wife and two infant children and a moderate estate. Such a testator in normal times might well wish to give his estate to his wife for life with remainder to his children in equal shares. If such a will is made and the whole family is then killed by the same bomb, the result will be that the whole estate will pass to the wife as life tenant for an instant of time, thus attracting further estate duty. If the gift to children is to vest on a child surviving the testator, the testator's estate will be divisible between the two children, since they will both be deemed to have outlived the testator. Assuming that they are infants, they will both necessarily die intestate. Then the elder child's share will pass to the younger child as statutory next of kin (attracting more duty), and finally the reunited estate will go to the younger child's statutory next of kin on the footing that he died last, without a spouse, issue, parent, brother or sister him surviving. If, then, the infant's mother's relations are in a closer degree than his father's, the upshot will be that the father's property will go to the mother's family, after deduction of several lots of duty.

The problem is to cure this position without using unduly many words, and I confess that I find it difficult to do so briefly. Obviously the basic idea must be to have an interval between each death, and the vesting of the gifts which are to take effect in consequence of that death. Seven days is, I think, rather a short period ; one should seek to have an interval long enough to make it reasonably likely that a person who dies later than the principal catastrophe of wounds inflicted in the principal catastrophe does not take a vested interest : the purpose is, of course, to save duty. Accordingly, I prefer an interval of one month. At one stage I tried to work out a precedent which simply reproduced an ordinary peace-time will, with an extra clause saying, " Nevertheless I direct that all interests given hereunder shall vest only on the expiration of one month from the date upon which they are hereinbefore directed to vest." But, apart from anything else, this arrangement really amounts to saying that the vesting date shall be a month after the vesting date, and for this reason I doubt whether it is desirable to use such a form.

I have come to the conclusion that one almost must deal with the postponed vesting expressly in connection with each gift. The resultant form would be somewhat as follows :—

" (*a*) I devise and bequeath all my real and personal estate whatsoever and wheresoever to my trustees upon trust to sell the same.

" (*b*) [Here would follow the ordinary trust for sale clauses.]

" (*c*) My trustees shall hold the investments from time to time representing such proceeds of sale (hereinafter called 'the trust fund') and the income thereof upon the trusts following :—

" (i) If my wife shall survive me by one calendar month, then as from the date of my death and thereafter during the life of my wife, upon trust to pay such income to my wife for her own use and benefit.

" (ii) Subject thereto as to the trust fund and the income thereof upon trust for all or any my children or child who shall (a) survive me by the space of one calendar month and (b) attain the age of twenty-one years or being female marry under that age, and if more than one as tenants in common in equal shares, provided always that if any child of mine either predeceases me, or (having survived me) dies without having attained a vested interest in the trust fund, leaving issue who survive the survivor of such child and myself by the space of one calendar month such issue of a child of mine shall for the purposes of this clause be substituted for such child of mine so dying, and shall, if they fulfil the conditions aforesaid, take the share of such child in the trust fund, taking among themselves (if more than one) in equal shares per stirpes."

The foregoing provision seems rather cumbrous, but is, I hope, accurate and effective.

Another correspondent makes the suggestion that the gifts to take effect in lieu of the primary interests, which are not to vest in the absence of the prescribed survivorship, might be made by way of a conditional codicil which would not be proved if the condition as to survivorship were not fulfilled. The suggestion is that such alternative gifts, being precautionary, might well be better left in obscurity if they do not in fact take effect. I imagine that the correspondent is thinking of the case where the primary gift is to the younger spouse absolutely and the alternative one to some outside person. I cannot see that anything is gained by trying to conceal the sort of family gift which I have set forth above. The probate rules as to conditional wills or codicils if the condition does not happen are to be found in the latest edition of " Tristram and Coote," at p. 36. It is there first laid down that a conditional testamentary disposition is one which is stated not to become operative at all save on the happening of a certain event. Such a disposition has to be distinguished from one where the conditional element consists only in that the possible happening of the event is stated as the reason for making the will. As the latter class of instrument is operative whether the event happens or not, it is essential to the plan to draw the codicil so that it shall be unambiguously subject to a condition precedent. Where that is done and the condition does not happen, the procedure is that the codicil is not proved, but that the codicil and an affidavit of the circumstances have to be filed with the will. The result is therefore that if this device is used one can prove only the straightforward will, which would be a convenience in administration, but that the codicil will necessarily get on to the file, so that its contents cannot be kept really secret.

Obituary.

Sir ROWLAND WHITEHEAD, K.C.

Sir Rowland Whitehead, Bt., K.C., died on Friday, 9th October, aged seventy-nine. He was educated at Clifton and University College, Oxford. In 1888 he was called to the Bar by Lincoln's Inn, of which Inn he was a Bencher. He was also a member of the Inner Temple. He practised in the Chancery Division and took silk in 1910. From 1906 to 1910 he was Liberal M.P. for South-east Essex. He served as private secretary (unpaid) to the Under-Secretary of State for the Home Department from 1906 to 1909, and Parliamentary Secretary (unpaid) to the Attorney-General from 1909–10.

Mr. G. E. DAVY.

Mr. George Edward Davy, solicitor, of Messrs. Hett, Davy and Stubbs, solicitors, of Brigg, Lincs., died on Monday, 5th October, aged sixty-four. He was admitted in 1901, and was Clerk to the Brigg Justices and Brigg R.D.C.

Mr. F. J. RUSSON.

Mr. Francis Joseph Russon, solicitor, of Messrs. Creswell and Russon, solicitors, of Bromsgrove, Worcs., died on Monday, 28th September, aged seventy-seven. He was admitted in 1888.

The Judicial Committee of the Privy Council began their Michaelmas Sittings on Tuesday last, 13th October, with a list of twenty-one appeals, of which sixteen were from India, three from West Africa, one from Canada and one from Gibraltar. Four judgments await delivery.

Landlord and Tenant Notebook.

Forfeiture for Non-payment of Rent : An Equitable Relief Case.

By way of a change, I propose to discuss this week a case in the decision of which emergency legislation played no part, though the war probably affected the course of events reviewed. *Chandless-Chandless* v. *Nicholson* (1942), 194 L.T.J. 80 (C.A.), turned, it may be, largely on the interpretation and scope of certain rules of court ; but, subject to that, the operation of an equitable principle of the law of landlord and tenant was the important feature of the case. The principle is one which is reminiscent of the type of re-examination that commences : " What you meant to say . . . " A landlord and tenant may agree in plain language that if the tenant gets into arrear the landlord may cancel the whole arrangement ; but the court, administering equity, will tell them that what they meant was to provide security for payments of rent.

The defendant was lessee to the plaintiff of premises under a lease reserving a ground rent of £12 a year. There was, apparently, an underlease. During her absence abroad a half-year's rent remained unpaid long enough to bring a forfeiture clause into operation, and the plaintiff issued a writ and obtained judgment. It does not appear that the undertenant sought a vesting order, but judgment was actually recovered against him. (As to the necessity, or otherwise, of proceeding against sub-tenants, see the observations of Atkin, L.J., in *Berton* v. *Alliance Economic Investment Co.* [1922] 1 K.B. 742 (C.A.), at p. 759.) This was in June, 1940. On 12th September, 1941, an application for relief was heard and an order made. The forfeited lease was a valuable one, and no doubt it was partly for this reason that the master made an order granting relief on the following conditions : the rent in arrear to be paid (it then amounted to £18) ; the costs of the original action to be paid ; some liability under the War Damage Act to be discharged ; and the lessee " to deal with and dispose of the claim for Sched. A tax within three months."

The details of the difficulty the lessee was experiencing with the Inland Revenue are not material, but it appears that she had claimed some relief ; and when the three months had elapsed the position was that she had arranged with H.M. inspector of taxes for the matter to stand over. In March, 1942, the ground landlord paid the whole of the tax, thereby providing himself with two answers to any allegation that the condition had been fulfilled : the lessee had not dealt with the claim, and it was he who had disposed of it.

The lessee then took out a summons for relief on the ground that the three months " ought " to be extended. This was dismissed for want of jurisdiction, as the original order did not provide for liberty to apply. Thereupon a fresh summons was taken out, asking that the original order be varied by inserting " liberty to apply " ; again it was held by the master that there was no power to do this, the original order being a consent order, though not so expressed to be. But the master now gave leave to appeal against the original order ; the judge in chambers dismissed this, again on the ground of lack of jurisdiction, and the lessee appealed to the Court of Appeal.

There were two practice points to be dealt with : the consent or no consent point, and the " liberty to apply " point. The court expressed itself " not satisfied " that the original order was " a consent order in the technical sense." Dealing with the arguable effect of the inarguable absence of any provision for liberty to apply, the court held that that did not matter ; and the result was an order granting relief on conditions : payment of the tax paid by the lessor, costs, and this time the water rate.

The basis of this judgment was the principle that a court of equity had always regarded the condition of re-entry as being merely security for the payment of rent.

This principle may be considered a corollary of a wider principle. To use the words of Lord Nottingham in *Cage* v. *Russel* (1681), 2 Vent. 352, " it is a standing rule of the court that a forfeiture should not bind where a thing may be done afterwards, or any compensation made for it—as where the condition was to pay money, or the like." This and s. 46 of the Judicature Act, 1925 : " In the case of any action for a forfeiture brought for non-payment of rent, the High Court or a judge thereof shall have power to give relief in a summary manner, and subject to the same terms and conditions in all respects as to payment of rent, costs and otherwise as could formerly have been imposed in the Court of Chancery . . . " indicate the line taken.

And this is the ingenious reasoning, in the words of Lord Erskine in *Sanders* v. *Pope* (1806) : " The forfeiture and the relief against it are founded upon this : the forfeiture arises out of the contract ; the parties covenant for their own security : therefore the breach works a forfeiture : but if the party can be restored to the same situation, the right to relief arises." And later : " Undoubtedly unless it is plain that full compensation can be given so as to put the other party in the same position precisely, a court of equity ought not to act." Lovers of logic will not be favourably impressed by the earlier passage, which at one point almost achieves a *non sequitur*. Engine and brake are part of the car, and if the car is made for purposes of motion, the

brake should not be needlessly applied: but this is not because engine and brake are parts of the car.

What one would like to know is the date on which the first summons was taken out by the lessee, or whether the judgment was ever executed and when. Presumably, though the order was not made till some fifteen months after the judgment, the summons was issued within six months of that event, or of execution. For while at one time equity was not bound by any limitation as regards time, the object of L.T.A., 1930, s. 3, later re-enacted as the Common Law Procedure Act, 1852, was certainly to compel the tenant to seek relief within six months after execution; and in *Howard* v. *Fanshawe* [1895] 2 Ch. 581, in which relief was sought "both under the general jurisdiction of the court and under the statute 4 Geo. 2, c. 28," Stirling, J., appears to have assumed that in either case the limitation would apply, when he observed (p. 588): "If the landlord desires to limit the time within which the tenant can apply for relief, he can avail himself of legal process to recover possession and so get the benefit of the statute."

Rules and Orders.

S.R. & O., 1942, No. 2033/L.28.

SUPREME COURT, ENGLAND.—FEES.

THE SUPREME COURT FEES (AMENDMENT) ORDER, 1942.

DATED SEPTEMBER 23, 1942.

The Lord Chancellor, the Judges of the Supreme Court, and the Treasury, in pursuance of the powers and authorities vested in them respectively by section 213 of the Supreme Court of Judicature (Consolidation) Act, 1925,* section 305 of the Companies Act, 1929,† and sections 2 and 3 of the Public Offices Fees Act, 1879,‡ do hereby, according as the provisions of the above-mentioned enactments respectively authorise and require them, make, advise, concur in, sanction and consent to, the following Order:—

1. In the Liverpool District Registry the fees prescribed by the Supreme Court Fees Order, 1930,§ shall be taken in cash instead of being taken by stamps, and accordingly paragraph 6 of that Order shall be amended by the substitution of "Manchester District Registry" for "Liverpool and Manchester District Registries."

2. This Order may be cited as the Supreme Court Fees (Amendment) Order, 1942, and shall come into operation on the 1st day of November, 1942.

Dated the 23rd day of September, 1942.

Simon, C. *Hugh Hallett*, J.
Caldecote, C.J. *Norman Birkett*, J.
Lords Commissioners of His Majesty's Treasury *J. P. L. Thomas*, *J. H. F. McEwen*.

* 15 & 16 Geo. 5, c. 49. † 19 & 20 Geo. 5, c. 23.
‡ 42 & 43 Vict. c. 58. § S.R. & O. 1930 (No. 579), p. 1728.

War Legislation.

STATUTORY RULES AND ORDERS, 1942.

E.P. 1977. **Apparel and Textiles.** Cloth (Making-up and Use) (No. 6). Directions, Sept. 28.
E.P. 2012. Apparel and Textiles. Footwear (Manufacture and Supply) (No. 4) Directions, Oct. 1.
E.P. 2053. **Canals and Inland Waterways.** Canal Control (No. 3) Order, Oct. 1.
E.P. 2048. **Control of Fuel** Order, 1942, General Direction (Central Heating and Hot Water Plants) No. 1. Permit, Oct. 1.
E.P. 2044. **Essential Work** (Building and Civil Engineering) Order, Sept. 30.
E.P. 2056. **Feeding Stuffs** (Regulation of Manufacture) Order, 1942. General Licence, Oct. 1.
E.P. 2031. Feeding Stuffs (Regulation of Manufacture) Order, Oct. 1.
E.P. 2061. **Food** (Milk) (G.B.). Milk (Scheme of Supply) Order, Oct. 3.
E.P. 2050. Food (Points Rationing) (No. 2) Order, 1942. Amendment Order, Oct. 2.
No. 1934. **Goods and Services** (Price Control).
E.P. 1995. **Machinery, Plant and Appliances** (Control) Order, 1942. General Licence, Oct. 1, *re* Canteen Equipment.
E.P. 2073. **Manufactured and Pre-packed Foods** (Control) Order, 1942. Amendment Order, Oct. 6, appointing days thereunder.
No. 2033/L.28. **Supreme Court, England.** Supreme Court Fees (Amendment) Order, Sept. 23.

Parliamentary News.

HOUSE OF LORDS.

India and Burma (Temporary and Miscellaneous Provisions) Bill [H.C.].
Local Elections and Register of Electors (Temporary Provisions) Bill [H.C.].
Read First Time. [14th October.
Prolongation of Parliament Bill [H.C.].
Read First Time. [13th October.

HOUSE OF COMMONS.

Welsh Courts Bill [H.C.].
Read Second Time. [14th October.

To-day and Yesterday.

LEGAL CALENDAR.

12 October.—At the Mansion House on the 12th October, 1874, Mr. William Abbott, a member of the Stock Exchange, appeared before the Lord Mayor charged with assaulting Mr. Henry Labouchere, the brilliant and stormy wit, journalist and politician. There was a cross-summons in which Abbott charged Labouchere with using abusive and threatening language calculated to provoke a breach of the peace. In a newspaper just founded called *The World* Labouchere wrote on finance, and two articles on certain City speculations had aroused the wrath of Abbott, who, meeting him in the street, attacked him on the subject, struck him with a stick and threatened to horse-whip him. The Lord Mayor said that he had nothing to do with the dispute, but could not allow disturbances in the street. A newspaper was entitled to criticise public proceedings and the courts were open to anyone who thought himself aggrieved thereby. The defendant was bound over in his own recognisances in £500 to keep the peace towards Mr. Labouchere for six months.

13 October.—In the English revolution Thomas Harrison was one of Cromwell's most active lieutenants. As a young man he worked with an attorney, one Mr. Hulk, of Clifford's Inn. He fought in the civil war, holding a commission in a cavalry regiment. He was zealous in bringing the King to trial, was present at nearly every meeting of the court and signed the death warrant. On the Restoration he was condemned to death and executed at Charing Cross on the 13th October, 1660. On the scaffold he showed much courage and enthusiasm. When a voice in the crowd cried out: "Where is your good old cause now?" he clapped his hand on his breast, saying with a smile: "Here it is, and I am going to seal it with my blood."

14 October.—The Irish legal world has produced no greater figure than John Philpot Curran, wit, orator and patriot, the advocate and defender of the men who in 1798 and 1803 had risen in arms for the freedom of their country. "Assassinate me you may; intimidate me you cannot!" he cried in a court practically occupied by the military, when a speech of his had provoked to threatening murmurs. In 1806 on the death of Pitt, he was appointed Master of the Rolls. He resigned in 1813. Since the hated measure of the Union his life had been saddened by the spectacle of Ireland degraded through the loss of her Parliament, and Dublin provincialised. Till his death he passed much of his time in London, where there was then a brilliant Irish circle. He also visited France. His health declined, but he wrote: "If it were merely *maladie* under sailing orders for the undiscovered country, I should not quarrel with the passport. There is nothing gloomy in my religious impressions." Leaving Dublin for the last time he said: "I wish it was all over," and he told another friend: "You will never see me more." Very soon after he was attacked by apoplexy and died without pain at his house in Brompton on the 14th October, 1817.

15 October.—Alexander Tytler was born at Edinburgh on the 15th October, 1747, and became an advocate in 1770. His first work, a supplement to Lord Kames's "Dictionary of Decisions" was called "The Decisions of the Court of Session." In 1780 he was appointed professor of universal history at Edinburgh. In 1790 he became Judge Advocate of Scotland and he wrote a treatise on the law of courts martial. In 1801 he was raised to the bench as Lord Woodhouselee. He died in 1813.

16 October.—Two days after being discharged from the service of Mr. Peter Persode, John Brian broke into his house in St. James's Street, stole money and valuables and set the place alight. Nothing could be saved, and after the fire was discovered the mansion burnt in a quarter of an hour. He was caught through trying to dispose of some of his spoils to a goldsmith. He said he had bought them from a strange man, but could give no proof, nor could he account for his movements on the night of the crime. Being condemned to death, he was executed in St. James's Street and hanged in chains at Acton Gravel Pits on the 24th October, 1707.

17 October.—On the 17th October, 1734, "the Sessions ended at the Old Bailey when John Butler, for breaking open a house in Red Lion Street, Clerkenwell, and stealing goods to a great value and Elizabeth Pugh, for the murder of her fellow servant by throwing a knife at him, received sentence of death."

18 October.—On the 18th October, 1781, "the convicts ordered for execution were carried from Newgate to Tyburn, where Shepherd, for forgery, was reprieved, just as the executioner was about to tie the rope about his neck." The judge who tried him had referred his case on a point of law for the determination of his brethren sitting at Serjeants' Inn, a sort of embryo Court of Criminal Appeal, but spoke so low that the man himself did not hear it and he was condemned to death with the other prisoners at the end of the Sessions. The judge, recollecting his name, had just time to save him from execution. Unfortunately the other judges eventually confirmed the verdict.

Notes of Cases.

APPEALS FROM COUNTY COURT.

Carter *v.* S. C. Carburetter Co., Ltd.

Lord Greene, M.R., MacKinnon and Goddard, L.JJ. 13th July, 1942.

Landlord and tenant—Rent restrictions—Limited company tenant—No right of personal occupation as statutory tenant—Whether entitled to protection of Act with regard to standard rent—Increase of Rent and Mortgage Interest (Restrictions) Act, 1920 (10 & 11 *Geo.* 5, *c.* 17), *s.* 1—*Rent and Mortgage Interest Restrictions Act*, 1939 (2 & 3 *Geo.* 6, *c.* 71), *s.* 3.

Defendant's appeal from an order by His Honour Judge Frankland at Otley on 8th April, 1942.

The appellants, a trading company, took a lease of a house belonging to the respondent, and in order to accommodate certain of their employees they divided it into three and let it off to three employees, their aggregate rent being equal to the rent which the company had contracted to pay under their lease. The dispute between the parties was as to whether the first instalment of rent, which it was sought to recover, should be calculated by reference to the contractual figure of £150 a year, or by reference and subject to the provisions of the Increase of Rent and Mortgage Interest (Restrictions) Act, 1920, s. 1, as amended by the 1939 Act, which provided that any excess over the standard rent should be irrecoverable notwithstanding any agreement to the contrary. The learned county court judge held that a limited company was not entitled to the benefit of s. 1 of the Act as amended, and that the full rent due under the lease was recoverable.

LORD GREENE, M.R., said that in *King* v. *York* (1919), 88 L.J.K.B. 839, it was held that the benefit of the corresponding sections inured in favour of a new tenant, and so on for tenant after tenant, and was not confined to a sitting tenant. In his lordship's opinion, that decision was correct, and there was nothing in any subsequent Acts of Parliament which weakened its force. It was applicable to the section now in force, and therefore the company, which was a new tenant, was entitled *prima facie* to the benefit of the section. The second point raised on behalf of the respondent was that it had been decided by a number of authorities (*Skinner* v. *Geary* [1931] 2 K.B. 546, etc.) that no person was entitled to any benefit of the 1920 Act, so far as dwelling-houses were concerned, except a person in actual personal occupation and that a limited company could not be in actual personal occupation. Every one of those authorities dealt with another part of the Act, s. 5 of the 1920 Act, now replaced by s. 3 of the 1923 Act. Those sections prohibited a landlord from exercising the right to recover possession against a tenant who was prepared to go on paying the standard rent and gives the tenant what was conveniently called a "statutory tenancy." In truth and in fact a tenant who took the benefit of the Act after the lease was ended was not a tenant at all, but had merely a personal right of occupation. The decisions under those sections had no application to the present case at all, which was a case of contractual tenancy. There was no differentiation, express or implied, in the section, as against a limited company incapable of personal occupation, and nothing to limit the effect of the sections to individuals in occupation. The appeal must be allowed.

MACKINNON and GODDARD, L.JJ., concurred.

COUNSEL: *The Solicitor-General* and *Ronald Hopkins*; *H. B. Vaisey*, K.C., and *F. W. Beaton*.

SOLICITORS: *The Treasury Solicitor*; *Jaques & Co.*, for *J. Lancelot Jones*, Ilkley.

[Reported by MAURICE SHARE, Esq., Barrister-at-Law.]

CHANCERY DIVISION.

***In re* Tharp: Longrigg *v.* People's Dispensary for Sick Animals of the Poor, Inc.**

Bennett, J. 17th July, 1942.

Will—Construction—Bequest to specific charity which ceases to exist before death of testatrix—Bequest to non-existent charity—Lapse.

Adjourned summons.

The testatrix, who died in 1940, directed her trustees to distribute her residuary estate between some thirty-four institutions, some being in this country and some abroad, their object in each case being the welfare of animals. One of the shares was bequeathed to "the Jerusalem Society for the Prevention of Cruelty to Animals." No society of that name had existed, but the testatrix during her life had subscribed to the Jerusalem branch of the Society for the Prevention of Cruelty to Animals. This branch had been wound up before the death of the testatrix, some of its assets being taken over by the defendants, the People's Dispensary for Sick Animals, which carried on a similar work and who claimed the legacy. A further share was given to "the Tangier Society for the Prevention of Cruelty to Animals." Such a society had never existed. The testatrix had subscribed to the Tangier fund for animals, but there was no evidence as to who had actually received the subscriptions. The defendants had a branch in Tangier and claimed this share also. There were gifts of shares to other societies abroad. By this summons the executors of the testatrix asked whether these bequests failed or ought to be applied *cy-pres*.

BENNETT, J., said that in the first case there was a misdescription and the testatrix had intended to give a share to the Jerusalem branch of the Society for Prevention of Cruelty to Animals. That branch had ceased to exist before her death. The bequest accordingly lapsed (*In re Rymer* [1895] 1 Ch. 19). As the gift was for a definite institution, *In re Watt* [1932] 2 Ch. 243 was distinguishable. As regards the Tangier gift, it was contended by the Attorney-General that, as the gift was to a non-existent society, it was for charitable purposes and did not fail (*In re Davis* [1902] 1 Ch. 876). Here, however, the testatrix believed such a society existed. As there was no such society, the principle of *In re Rymer* applied, and there was accordingly an intestacy as to this share also.

COUNSEL: *Bushe-Fox* (for *Mendel*, on war service); *R. Goff*; *Danckwerts*; *R. Gilbert*; *G. D. Johnston*.

SOLICITORS: *Preston, Lane-Claypon & O'Kelly*, for *Longrigg & Pye-Smith*, Bath; *Moon, Gilks & Moon*; *Morrish, Strode & Searle*; *Treasury Solicitor*; *Amery-Parkes & Co.*

[Reported by Miss B. A. BICKNELL, Barrister-at-Law.]

KING'S BENCH DIVISION.

J. H. Rayner & Co., Ltd. *v.* Hambro's Bank, Ltd.

Atkinson, J. 4th May, 1942.

Contract—Letter of credit issued by bank covering shipment of goods—Goods described by different words in bill of lading and letter of credit—Goods identified in terms customary in trade—No ground for bank's refusal to pay drafts.

Action tried by Atkinson, J.

The first plaintiffs made a contract as agents for undisclosed principals, the second plaintiffs, for the sale of coromandel ground-nut kernels to buyers in Denmark. The defendant bank issued to the plaintiffs a letter of credit, for account of the buyers, available for drafts accompanied by invoice and clean bill of lading covering a shipment of 1,400 tons of "coromandel ground-nuts in bags." Relying on that credit, the plaintiffs delivered the 1,400 tons to the buyers in Denmark, but when they presented drafts the bank refused to pay. The plaintiffs therefore brought this action, claiming a declaration that the bank were bound to accept the drafts which were presented by them in pursuance of an irrevocable credit opened with the bank on the plaintiffs' behalf. The bank abandoned their first defence, that, owing to the occupation of Denmark by Germany, they could not pay without infringing the law as to trading with the enemy, and relied on the fact that the bill of lading presented by the plaintiffs described the goods as "machine shelled ground-nut kernels" instead of "coromandel ground-nuts," as required by the letter of credit. Evidence proved that the common description of coromandel ground-nuts in a bill of lading was simply "ground-nut kernels." The bank contended that, in issuing a credit, a bank knew nothing about the particular transaction between buyer and seller, or about the usages of the trade; and that they were bound to see that the documents conformed strictly with the terms of the credit.

(*Cur. adv. vult.*)

ATKINSON, J., said that a previous transaction in exactly the same form as the present had gone through without demur only three days before the issue of the credit now in question. The bank having objected that the bill of lading did not identify the goods referred to in the letter of credit, the plaintiffs obtained certificates from the Madras Chamber of Commerce and other sources identifying the goods, but payment was again refused. It was contended for the bank that each document presented must correspond precisely with the letter of credit. The bill of lading described the goods in the normal trade way. The test to be applied was whether the documents as a whole described and identified the goods mentioned in the letter of credit in the customary trade way and in the customary trade terms. If a bank wished to have the bill of lading in exactly the same words as the credit they should say so clearly. There would be judgment for the plaintiffs.

COUNSEL: *Sir Robert Aske*, K.C., and *Valentine Holmes*; *Paull*, K.C., and *Scott Cairns*.

SOLICITORS: *Jaques & Co.*; *Slaughter & May*.

[Reported by R. C. CALBURN, Esq., Barrister-at-Law.]

Notes and News.

Honours and Appointments.

As announced briefly in our "Current Topic," at p. 289 of last week's issue, the King has approved the appointment of Mr. GONNE ST. CLAIR PILCHER, M.C., K.C., to be a Justice of the High Court of Justice, Probate, Divorce and Admiralty Division, in the place of the late Mr. Justice Langton. Mr. Pilcher is fifty-two years of age and was called to the Bar by the Inner Temple in 1915 and took silk in 1936. He won the M.C. in the last war. He was junior counsel to the Admiralty in the Admiralty Court before the present war and has since been attached to the War Office.

Notes.

An ordinary meeting of the Medico-Legal Society will be held at Manson House, 26, Portland Place, W.1, on Thursday, 22nd October, 1942, at 4.30 p.m., when a Paper will be read by Lieut.-Col. W. W. Mansfield, M.I.Mech.E., on "Disguise in Handwriting."

The usual monthly meeting of the directors of the Law Association was held on the 5th October, Mr. G. D. Hugh Jones in the chair. There were six other directors present. A sum of £361 5s. was voted in relief of deserving applicants, and other general business was transacted.

The following dates have been appointed at the Central Criminal Court for the Sessional Sittings of the Courts for the ensuing year:—

1942.—November 10; December 2.

1943.—January 12; February 9; March 9; March 30; May 4; May 25; June 29; July 20; September 14; October 19.

The Board of Trade announce that as from Friday, 16th October, the functions of the branch of the Insurance and Companies Department at Blackpool, with the exception of those relating to the winding up of companies, are being transferred to London. Correspondence on company matters other than winding-up should henceforth be addressed to the Insurance and Companies Department, Board of Trade, Romney House, Tufton Street, London, S.W.1.